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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 4, 2003

Mr. Peter M. Suwak
Pete's Surplus Building
PO Box I
Washington, DC 15301

Re: Abraham Fotta
v. Trustees of the United Mine
Workers of America, et al.
Application No. 02A1038

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on June 4, 2003, extended the time to and including August 10, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Clayton R. Higgins, Jr.
Assistant Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Before: BECKER, Chief Judge, SLOVITER, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE, RENDELL,
BARRY, AMBRO, FUENTES AND SMITH, Circuit
Judges and SCHWARZER*, District Judge

ORDER

The petition for rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

/s/

_____

Circuit Judge

Dated: Mar 13 2003

*Honorable William W Schwarzer, Senior District Court Judge, who sat on the original panel, is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Submitted Under Third Circuit LAR 34.1(a)
January 14, 2002

Before: ALITO and ROTH, Circuit Judges
SCHWARZER*, District Judge

JUDGMENT

This case came to be heard on the record before the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 14, 2002:

On consideration whereof:

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 20, 2001, be and the same is affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: February 11, 2003

PRECEDENTIAL

Filed February 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 97-cv-00566)
District Judge: Honorable William L. Standish

Submitted Under Third Circuit LAR 34.1(a)
January 14, 2002

Before: ALITO and ROTH, *Circuit Judges*
SCHWARZER,* *District Judge*

(Opinion filed: February 11, 2003)

---

* Honorable William W Schwarzer, Senior District Court Judge for the Northern District of California, sitting by designation.

OPINION OF THE COURT

ROTH, Circuit Judge:

Appellant, Abraham Fotta, is a disabled miner who had to wait nine years to receive his disability payments. He has now received all the delayed payments but has sued his pension fund, claiming that § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) entitles him to the interest that would have accumulated on his delayed payments. After a bench trial, the District Court held that Fotta was not entitled to interest because he failed to prove his disability payments were withheld wrongfully. Fotta raises three issues on appeal. First, did the District Court err by requiring Fotta to prove that the withholding of his disability payments was wrongful? Second, if so, did the District Court err when it found that his payments were not wrongfully withheld? Finally, did the District err in denying class certification to Fotta to represent a class of miners who have received delayed disability payments? After careful consideration, we believe that the District Court correctly answered each of these questions and we will affirm its judgment.

I. Factual and Procedural History

On July 23, 1984, Abraham Fotta, while on his job for the United States Steel Mining Company, Inc., stepped off a motor, twisting his ankle and, as has ultimately been determined, aggravating a pre-existing condition. On the day of the injury, Fotta worked through his shift. He told his foreman about the injury, but no accident report was filed. Fotta waited until the following day to visit his employer's physician, Dr. Eisley. Dr. Eisley found that Fotta had a synovial cyst (a type of tumor) in his ankle and referred him to Dr. Mitchell, an orthopedic surgeon. Dr. Mitchell operated to remove the tumor and at the same time treated Fotta for a fractured ankle.

Following the surgery, Fotta's 18 year litigation odyssey began. He first filed a claim for Workmen's Compensation

benefits, which was denied on May 10, 1985. The Workmen's Compensation Referee found that Fotta had failed to prove that the mine accident caused his disability. Based on a report from Dr. Mitchell, the Referee concluded that Fotta's disability was caused by his pre-existing villonodular synovitis (recurring ankle cysts), not his accident. Fotta twice appealed this decision, and the Workmen's Compensation Appeals Board twice affirmed the Referee. Fotta then appealed to the Pennsylvania Supreme Court.

On July 15, 1985, when his second appeal to the Workmen's Compensation Appeal Board was pending, Fotta received some good news. The Social Security Administration had awarded him disability benefits on the basis of a malignant synovial tumor of the right ankle. Fotta was then able to embark on the next phase of his search for disability benefits. On February 7, 1986, he submitted an application for disability benefits to defendant, the United Mine Workers of America Health and Retirement Fund of 1974. The Fund provides disability payments when an applicant proves that (1) he was involved in a mine accident, (2) he received a Social Security Disability Insurance award, (3) he is an employee covered by the plan, and (4) the mine accident caused the disability. *See* Section 615.1.12 of the Fund's Pension Processing Manual. When the cause of the disability is not obvious, a mine accident that "substantially aggravates" a pre-existing condition can fulfill the fourth condition.

The Fund gathered information concerning Fotta's application. It received records from the Social Security Administration, from Fotta's employer, and from Drs. Mitchell and Eisley. The Fund also reviewed records of the Workmen's Compensation proceedings. After considering this information, the Fund informed Fotta, in a letter dated November 18, 1987, that his application had been denied because he did not "establish that [his] disability was caused by a mine accident." The letter also stated that Fotta could call if he had any questions and that, if he was not satisfied that the decision was correct, he could request a hearing within 90 days. Fotta did not take any action in response to this denial of benefits.

Fotta did, however, persist in his Workmen's Compensation appeals. After almost six years of litigation, the Pennsylvania Supreme Court rewarded Fotta's perseverance. On June 1, 1993, the court reversed the Workmen's Compensation Appeal Board and granted Fotta Workmen's Compensation benefits.

Buoyed by this success, Fotta returned to his claim for disability benefits from the Fund. On June 15, 1993, he sent the Fund a copy of the Pennsylvania Supreme Court's decision. The opinion mentioned a letter from Dr. Mitchell that the Fund had not previously seen. The letter stated that "the majority of [Fotta's] disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1146 (Pa. 1993). Despite Fotta's failure to appeal the November 18, 1987, denial of disability benefits, the Fund on November 1, 1993, decided in light of the new information that Fotta had established that a mine accident substantially aggravated his pre-existing ankle cysts and awarded disability benefits to Fotta. The Fund initially awarded him $18,835 in retroactive payments. After adjusting the starting date, the Fund paid him an additional $1,965.

Fotta, however, was not satisfied. He asked the Fund for interest on the retroactive payments. When the Fund declined to pay him interest, Fotta sued the Fund and the individual defendants in the United States District Court for the Western District of Pennsylvania. He alleged that by failing to pay him interest on his retroactive payments, the Fund violated ERISA requirements promulgated at 29 U.S.C. § 1001 *et seq.*

The District Court originally dismissed his law suit for failure to state a claim under ERISA. Fotta appealed. In *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 165 F.3d 209 (3rd Cir. 1998) (*Fotta I*), we reversed and remanded the case to the District Court. We held that § 502(a)(3)(B), which empowers courts to award appropriate equitable relief to redress violations of ERISA or ERISA regulated plans, provides a cause of action for interest on delayed pension benefits

even when the beneficiary acquired the delayed benefits without resorting to litigation.

On remand, the District Court held a bench trial and concluded that Fotta was not entitled to relief because he had failed to show that the delay in paying his disability was due to any wrongful conduct by the Fund. The District Court also denied Fotta's request for class certification because he had failed to demonstrate that the proposed class met the commonality requirement of Federal Rule of Civil Procedure 23(a). Fotta appealed.

II. Jurisdiction and Standard of Review

Because Fotta sued under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*, the District Court had federal question jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291.

The decision to award pre-judgment interest is within the discretion of the District Court, *see Fotta*, 165 F.3d at 214, but we exercise plenary review over its interpretation and application of legal precedent. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3rd Cir. 2000). We review the District Court's decision to deny class certification for an abuse of discretion. *Id.* at 136

III. Discussion

A. The Claim for Interest

Fotta contends that the District Court used the wrong standard to evaluate his claim for interest. He claims in addition that, even if the District Court had applied the correct standard, it erred in finding that he failed to satisfy it.

1. Must Fotta prove that the Fund acted wrongfully?

Fotta's primary claim is that the District Court misapplied § 502(a)(3)(B), using the wrong standard to evaluate his claim for interest. The District Court held that the Fund is liable for interest only if Fotta can show that

the Fund "wrongfully delayed" his disability benefits. Fotta contends that he need not prove the Fund acted wrongfully. He asserts that § 502(a)(3)(B) makes the Fund presumptively liable for interest whenever ERISA benefits are delayed, regardless of the reason.

Section 502(a)(3)(B) allows a beneficiary of an ERISA plan to sue for "other appropriate equitable relief," which we have held includes interest on delayed payments. *See, e.g., Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992); *Fotta I*, 165 F.3d at 209. Section 502(a)(3)(B) does not, however, allow a beneficiary to sue for equitable relief for any reason, but only "(i) to redress [violations of ERISA or the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). As we emphasized in *Fotta I*, § 502(a)(3)(B) "does not . . . authorize appropriate equitable relief *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or enforc[ing] any provisions of ERISA or an ERISA plan.'" *Fotta I*, 165 F.3d at 213 (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993)). Accordingly, an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself. *See Jackson v. Fotris Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001) (requiring "a showing that the plan was breached before interest on back payments may be awarded under [§ 502(a)(3)(B)]."); *Holmes*, 213 F.3d at 128 (noting that "ERISA permits actions to recover interest on wrongly withheld benefits"); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497-99 (7th Cir. 1999) (holding that ERISA "authorizes suit to redress plan violations," but concluding there was no breach of ERISA or terms of the plan); *Anthuis*, 971 F.2d at 1007-08 (upholding an award of prejudgment interest when the plaintiff's severance benefits were withheld in violation of an ERISA plan). We conclude that it is clear from the case law that unless a beneficiary proves his payments were wrongfully withheld, he is not entitled to interest.

Fotta argues that our opinion in *Fotta I* contradicts this rule. Fotta cites a single sentence from that opinion: "We

now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed." *Fotta I* at 214. From this, he argues that interest is presumptively appropriate whenever benefits are delayed whether they are delayed wrongfully or not. There is no reason, however, to believe that *Fotta I* made liability to pay interest independent of wrongdoing.

In fact, *Fotta I* did not even address the issue of liability. It determined who has a cause of action under § 502(a)(3)(B). Before *Fotta I*, only an ERISA beneficiary who had brought a legal action to recover wrongfully withheld benefits could sue for interest under § 503(a)(3)(B). *See, e.g., Anthuis*, 971 F.2d at 1010. In *Fotta I*, we were asked to decide whether a beneficiary who recovered wrongfully withheld benefits without resorting to litigation could sue under § 502(a)(3)(B). *Fotta I*, 165 F.3d at 211. ("This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his her benefits due under an ERISA plan only after considerable delay, but without resorting to litigation to recover that payment, has a cause of action [under § 503(a)(3)(B)]."). We determined that § 503(a)(3)(B) did provide a cause of action for such plaintiffs. We did not, however, address the standard of liability that would trigger an obligation to pay interest.

Because *Fotta I* did not change the standard of liability, the District Court applied the correct standard: a beneficiary is presumptively entitled to interest on his delayed benefits only if those benefits were wrongfully withheld or wrongfully delayed, that is, only if they were withheld or delayed in violation of ERISA or an ERISA plan.

2. Did the Fund Act Wrongfully?

Assuming for the sake of argument that the District Court applied the correct standard, Fotta advances an alternative agument. He urges us to reverse the District Court on the basis that the Fund did wrongfully delay his benefits.

In order to prove the Fund acted wrongfully, Fotta must meet a high standard. The Fund's plan grants the Fund discretion in making eligibility determinations, giving it in

Article VIII.A, B(a) "full and final determination as to all issues concerning eligibility for benefits." Thus, the Fund's eligibility determinations are wrongful only if they are arbitrary and capricious. *See Moats v. UMWA Health & Retirement Funds*, 981 F.2d 685, 687 (3rd Cir. 1992).

The Fund provides disability benefits only when the applicant has carried his burden of proving that a mine accident either directly caused his disability or caused his disability by substantially aggravating a pre-existing condition. When the Fund rejected Fotta's claim for disability benefits on November 18, 1987, it concluded that it had insufficient evidence of a mine accident to conclude that a mine accident had caused Fotta's disability by substantially aggravating a pre-existing condition.

Fotta challenges this holding. Fotta claims that the Fund acted arbitrarily in several ways. He claims that the Fund failed to inform him of the true reason for its denial. Fotta received the November 18, 1987, letter, however, that informed him he did not qualify for benefits, stating "Your application was denied because: You have not established that your disability was caused by a mine accident." This same letter informed Fotta that, if he was not satisfied that this decision was correct, he could request a hearing.

Fotta next claims that the Fund acted arbitrarily and capriciously by failing to ask him for additional medical data or by failing to get more medical data itself. The Fund, however, was diligent in collecting data. It requested medical information from Fotta's employer and examined medical reports from Drs. Mitchell and Eisley. It also examined the records of the Social Security Administration and the findings of the Workmen's Compensation Referee. The Fund's decision to rest on this information would not appear to be arbitrary and capricious.

Fotta also claims the Fund acted arbitrarily and capriciously because it concluded there was no mine accident when it was the fault of Fotta's employer, not of Fotta, that no accident report had been filed. The Fund's Pension Processing Manual, however, permits the establishment of the occurrence of a mine accident by an accident report, an employer statement or Workmen's

Compensation records. Fotta could have demonstrated the occurrence of the mine accident without an "accident report" *per se*, as he ultimately did in the Workmen's Compensation proceedings. The employer's failure to file an accident report did not, therefore, preclude Fotta from receiving benefits.

Fotta finally alleges that the Fund acted arbitrarily and capriciously by "acknowled[ing] the existence of a causal link between some incident and the injury, contrary to the worker's compensation finding." As support for this allegation, Fotta points to a December 30, 1996, note of a Clinical Consultant from the Fund's Central Office that, "Based on Mitchell's report I accept that there was an ankle injury and that it aggravated a pre-existing tumor." Fotta does not go on, however, to cite the remainder of the paragraph which indicates that the consultant was not convinced how the ankle was injured or where. This report is not, therefore, inconsistent with the November 18, 1987, denial of benefits on the basis of lack of evidence that a mine accident caused the disability.

We also note a second reason to uphold the denial of interest. Fotta did not request a hearing to challenge the November 18, 1987, denial of benefits and he waited six years before he presented a renewed request to the Fund for benefits. Section 502(a)(3)(B) allows a plan beneficiary to obtain "appropriate equitable relief" when his benefits have been wrongfully withheld, and, although "interest is presumptively appropriate," *Fotta I* at 214, it remains an equitable remedy subject to the usual conditions. One of the reasons for denying an equitable remedy is delay by the claimant. As the Eighth Circuit has stated, "prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable. Such circumstances may include bad faith or dilatoriness by the claimant." *Stroh Container Co. v. Delphi Industries, Inc.* 783 F2d 743, 751 (8th Cir. 1986). We conclude from the facts of this case that Fotta's delay in seeking his benefits would make an award of interest inequitable.

B. Denial of Class Certification

Fotta also contends that the District Court abused its discretion by denying his motion for class certification on

the ground that the putative class did not meet the "commonality" requirement of Federal Rule of Civil Procedure 23. Fotta proposed a class of more than 116,000 miners who are receiving or have received disability benefits following some kind of administrative delay. He argues that, because all the members of the class are presumptively entitled to interest, they share a common question of whether interest is available and what the correct rate of interest should be. Because, however, the putative members of the class are not entitled to interest if their benefits were not wrongfully delayed, they do not share common issues of law or fact and thus do not meet the requirements of Rule 23.

A district court can only certify a proposed class if the class meets all four requirements of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy of representation. *See* F.R.C.P. 23(a); *In re Prudential Ins. Co. of America Sales Litig.*, 148 F.3d 283, 308-09 (3rd Cir. 1998). Our holding that an ERISA beneficiary is entitled to interest only if the benefits were wrongfully withheld or wrongfully delayed requires us to conclude that the putative class members share no common issues of law or fact. To decide whether each putative class member would be entitled to interest, the District Court would have to determine whether the Fund wrongfully withheld or wrongfully delayed payment for each class member. The District Court would also have to determine the remedy for each class member, an individual determination. As we stated in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3rd Cir. 2000), a belief that "the interest entitlement of every class member can be calculated using a single, objective formula . . . ignores [*Fotta I*'s] clear holding that interest on delayed ERISA benefits is an equitable remedy dependent upon the individual facts of each claim." *Id.* at 137. Because both liability and the appropriate remedy must be determined for each plaintiff, no common issues of law or fact exist. We cannot, therefore, say that the District Court abused its discretion in denying class certification.

IV. Conclusion

For the reasons stated above, we will affirm the judgment of the District Court.

16A

SCHWARZER, Senior District Judge, concurring:

I concur in the result reached by the majority but write separately because I arrive at that result by a substantially different route. In *Fotta v. Trustees of the United Mine Workers of America, Health and Retirement Fund*, 165 F.3d 209 (3d Cir. 1998) (*Fotta* I), this court held that a fund beneficiary may bring an action under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001—1461 (ERISA), to recover interest from the plan on benefits paid after some delay. Specifically, we held that ERISA § 502(a)(3)(B), 29 U.S.C. 1132(a)(3)(B), which permits a beneficiary "to obtain other appropriate equitable relief (i) to redress [violations of ERISA or of the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan[,]" provides a cause of action for a beneficiary to recover interest on benefit payments.

The District Court held, and the majority agrees, that to recover interest on delayed payments a beneficiary must prove that benefits were withheld in violation of his ERISA plan or of ERISA itself, i.e., that the denial was arbitrary and capricious. The majority finds support for its position in *Fotta* I, which states, quoting from *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993), that § 502(a)(3)(B) "does not . . . authorize appropriate equitable relief *at large*, but only 'appropriate equitable relief' for the purpose of redress[ing any] violations or enforc[ing] any provisions of ERISA or an ERISA plan." Op. at 6. But the majority fails to quote this court's statement immediately following: "As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation. Therefore, an award of interest is an equitable remedy enforcing an ERISA plan provision, albeit an implied one, within the meaning of section 502(a)(3)(B)." 165 F.3d at 213.

Fotta makes clear, therefore, that the delay in payment of benefits to which the beneficiary is entitled is a violation of the plan without more and that recovery of interest enforces the plan. The *Fotta* I court repeatedly and consistently refers to interest to compensate for delay in payment without ever qualifying that the delay must be shown to have been wrongful. Analogizing the instant claim to an

award of prejudgment interest, it explained that "prejudgment interest typically is granted to make a plaintiff whole because the defendant may *wrongly benefit* from use of plaintiff's money," quoting *Schake v. Colt Industries*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992) (emphasis added); *see also Anthuis v. Colt Industries*, 971 F.2d 999, 1009 (3d Cir. 1992).

Thus, wrongfulness is an element of the beneficiary's claim only in the sense that the plan's withholding of his money is wrongful in unjustly enriching the plan and depriving the beneficiary. That the court did not intend to condition the cause of action to recover interest on delayed benefits upon proof of a further violation of the plan or of ERISA is confirmed by the court's statement of its rationale:

> The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in *Schake* and *Anthuis* — *viz.*, making the claimant whole and preventing unjust enrichment — are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.
>
> Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.3d at 212.

The majority also cites *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000), which considered *Fotta* I, albeit in the context of determining the appropriate rate of interest to be paid on delayed pension benefits. The court, in passing and without discussion, referred to *Fotta* I as holding that a beneficiary was entitled

to interest on "wrongfully withheld benefits" whether recovered through judicial action or through nonjudicial means. *Id.* at 131. In the context of the *Fotta* I rationale, however, which the *Holmes* court adopted, that statement cannot fairly be interpreted as imposing a condition of proof of more than unjustified delay. Thus, the court described "Fotta's two primary justifications for interest awards: (1) ensuring full compensation to the plaintiff; and (2) preventing unjust enrichment," *id.* at 132, and it noted that "Fotta did not impose a requirement of culpability [on the defendant's part . . .]." *Id.* at 133.

A case squarely in point not cited by the majority is *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002). Dunnigan sued on her own behalf and on behalf of a class of similarly situated beneficiaries of MetLife's ERISA plan to recover interest on benefits paid subsequent to the date when the participant was entitled to receive payment. The district court dismissed the action for failure to allege bad faith on the part of MetLife. The court of appeals reversed. It held first that interest may be recovered under § 502(a)(3)(B) "[w]hen benefits are paid only after the date on which the beneficiary was entitled to receive them . . . [because] the beneficiary has not received the full value of what was promised and, to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified)." 277 F.2d at 229. It then held that no showing of bad faith is required, stating:

> The opinions of the Third and Seventh Circuits have recognized that interest can be appropriate, equitable "make whole" relief under § 502(a)(3)(B), without any requirement that a plaintiff allege or prove bad faith on the part of the defendant. *See Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 498-499 (7th Cir. 1999) . . . . *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3d Cir. 1998). . . .

277 F.3d 229-30. The court went on to state:

> Dunnigan's complaint alleges that she was entitled to disability benefits, and that the payment of those benefits was delayed nearly five years . . . . [I]t asserts that payment of her benefits was unreasonably delayed

> and made long after she was entitled to receive them. Such a delay enriches the fiduciary at the expense of the beneficiary. Unless such a delay is justified, we see no reason why it does not constitute a breach of fiduciary duty.

277 F.3d at 230.

The majority also cites *Clair v. Harris Trust & Savings Bank*, 190 F.3d 495 (7th Cir. 1999), yet that case lends no support to its position. While the case was ultimately decided on the merits of the beneficiaries' claims, it had this to say about their entitlement to interest on delayed ERISA benefits:

> The defendants' position would have the odd implication that if the settlement date were June 30, 1990, and the bank did not cut a check to the retiring employee until July 1, 1991, the employee would have no redress, since he would have received his full plan benefits, albeit ten months after the last date on which he was entitled to receive them under the terms of the plan. *The violation of the plan would be plain*, but there would be no remedy.

190 F.3d at 498 (emphasis added).

Only one case appears to be in agreement with the majority. In *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 750 (8th Cir. 2001), the court affirmed the denial of interest on delayed benefit payments, holding that "a showing [is required] that the plan was breached before interest on the back payments may be awarded under ERISA." It reached that decision on the authority of *Clair*, *Holmes* and *Fotta* I and *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981). As the foregoing discussion shows, *Clair*, *Holmes* and *Fotta* I do not support the court's holding; those cases stand for the proposition that an unjustified delay in payment of benefits constitutes a violation of the plan entitling beneficiaries to claim interest. And in *Dependahl*, the Eighth Circuit awarded prejudgment interest, not on the ground that an ERISA violation had been proved (which was necessarily true since plaintiffs had obtained judgment) but on equitable grounds. Quoting from *Hodgson v. American Can Co.* , 440 F.2d 916,

922 (8th Cir. 1971), the court said, "From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use." It continued:

> We believe these same considerations should be followed in an award of prejudgment interest with regard to an ERISA violation. The former executives [plaintiffs] have been denied their contractual severance benefits for a period of approximately four years before final judgment was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these circumstances, an award of prejudgment interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. s 1132(a)(3)(B).

653 F.2d 1218. Upon analysis, therefore, *Fortis* provides scant support for the majority's position.

In sum, the authorities (with the questionable exception of Fortis) establish that an ERISA beneficiary makes out a cause of action for interest where payment of benefits has been unjustifiably delayed without proof that the plan's action was wrongful in the sense of arbitrary or capricious. Prejudgment interest is, however, an equitable remedy. "[A]warding prejudgment interest is within the district court's discretion, 'given in response to considerations of fairness and denied when its exaction would be inequitable." *Fotta* I, 165 F.3d at 213 (quoting *Anthuis v. Colt Indus. Operating Co.*, 971 F.2d 999, 1109 (3d Cir. 1992)). The court added that "interest is presumptively appropriate when ERISA benefits have been delayed." 165 F.3d at 214. To the same effect, *see Holmes*, 213 F.3d at 131.

Here, the District Court rejected the interest claim because the delay in payment was due to plaintiff's failure to provide the Fund an accident report, an employer

statement or Workmen's Compensation records to establish the occurrence of a mine accident as required under the Fund's rules. The court found, moreover, that after the Pennsylvania Supreme Court decision which first established plaintiff's eligibility, the Fund promptly processed plaintiff's claim and made a lump—sum payment of the benefits he would have received had he established eligibility at the time of his original application. Thus, the Court implicitly found that the delay was justified. In these circumstances, it could not be said that the District Court abused its discretion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

ORDER

In order to correct a typographic error in a citation made in the fourth paragraph of Section III. A. 1 of the Court's opinion filed February 11, 2003, it is hereby O R D E R E D that the following text is substituted for that paragraph:

> In fact, Fotta I did not even address the issue of liability. It determined who has a cause of action under § 502(a)(3)(B). Before Fotta I, only an ERISA

beneficiary who had brought a legal action to recover wrongfully withheld benefits could sue for interest under § 502(a)(3)(B). See, e.g., Anthuis, 971 F.2d at 1010. In Fotta I, we were asked to decide whether a beneficiary who recovered wrongfully withheld benefits without resorting to litigation could sue under § 502(a)(3)(B). Fotta I, 165 F.3d at 211. ("This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his her benefits due under an ERISA plan only after considerable delay, but without resorting to litigation to recover that payment, has a cause of action [under § 502(a)(3)(B)]." We determined that § 502(a)(3)(B) did provide a cause of action for such plaintiffs. We did not, however, address the standard of liability that would trigger an obligation to pay interest.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: March 28, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
	)	
Defendants	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this civil action, plaintiff, Abraham Fotta, seeks interest from defendants, Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 (the Fund), Michael Holland, Donald Pierce, Elliot Segal and Joseph Stahl, under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA), on a back-:payment of disability pension benefits granted by the Fund to plaintiff.. After a non-jury trial, and based on the findings of fact and conclusions of law that follow, judgment will be

entered in favor of defendants and against plaintiff.[1]

Findings of Fact

1. Prior to July 23, 1984, plaintiff, Abraham Fotta, experienced problems with his right ankle due to villonodular synovitus, which is a type of tumor. On July 23, 1984, while working as a supply motorman at the United States Steel Mining -Company, Inc.'s Maple Creek Mine, plaintiff fell due to an accumulation of condensation, which made the mine surfaces slippery,[2] In the fall, plaintiff injured his right ankle, Despite his injury, plaintiff completed his shift. Although no accident report was filed, plaintiff's foreman was informed about the occurrence of the accident. Plaintiff declined to go to the employer's medical clinic immediately following the accident, opting to see the employer's doctor the next day.

2. On July 24, 1984, plaintiff went to the employer's medical clinic. At that time, plaintiff was seen by Dr. Eisley, who noted swelling in plaintiff's right ankle, but no fracture or dislocation. Dr. Eisley also noted a synovial cyst. Plaintiff was informed that he would not be approved for treatment at the clinic, and that he should see his own doctor. Subsequently, x-rays of plaintiff's right ankle were taken, and he was given crutches. When plaintiff's right ankle failed to improve, he was referred to William J. Mitchell, M.D., an

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[1] In making its findings of fact, the court has taken into consideration the stipulated facts submitted by the parties as Joint Exhibit 6, as well as the testimony offered by the parties during the trial.

[2] United States Steel Mining Company is a subsidiary of USX Corporation.

orthopedic surgeon.

3. On August 24, 1984, plaintiff was seen by Dr. Mitchell, who noted that plaintiff had a fracture just behind the inner condyle of his tibia and a bone cyst on the fibula. On December 3, 1984, Dr. Mitchell removed the tumor on plaintiff's right anklet Plaintiff was hospitalized for two weeks in connection with this surgery.

4. Following his surgery, plaintiff filed a claim for Workmen's Compensation benefits, claiming that his injury was work-related. The claim was denied by a Workmen's Compensation Referee on May 10, 1985. With respect to the medical evidence submitted by plaintiff in support of his claim for Workmen's Compensation benefits, the Referee made the following findings of fact:

* * *

> 4. Claimant submitted a report dated January 4, 1985 of Dr. William J, Mitchell indicating the Claimant had a villonodular synovitis (a type of tumor) which was not caused by trauma and that it was possible that trauma could cause an aggravation of the tumor, which is a; non-malignant tumor and one that can recur locally repeatedly.
>
> * * *
>
> 6. Your Referee finds Claimant's disability is not due to subject incident but is and was due to a non- malignant tumor which pre-existed subject incident, Further, that Claimant failed to prove by unequivocal medical evidence, that subject incident aggravated the pre-existing tumor.

(Joint Exh. 1, p. 42).

5. Plaintiff appealed the Referee's decision to the

Workmen's Compensation Appeal Board, which affirmed the Referee's decision, but permitted plaintiff to resubmit his claim to the Referee for consideration of medical reports by a treating physician, Dr, Mark A. Goodman. Thereafter, plaintiff filed the appropriate petition, and he was granted a new hearing before the Referee, At the second hearing before the Workmen's Compensation Referee, plaintiff testified and offered two medical reports from Dr. Goodman. In addition, plaintiff and the employer each submitted a Report from Dr. Mitchell. Based on the report of Dr. Mitchell submitted to the Referee by the employer, plaintiff's claim for Workmen's Compensation benefits was denied a second time. Once again, plaintiff appealed the denial to the Workmen's Compensation Appeal Board. (Joint Exh. 1, pp. 50-51).

6. On July 15, 1985, plaintiff was awarded disability insurance benefits by the Social Security Administration due to his ankle condition, The transmittal letter from the Social Security Administration indicates that plaintiff's disability began on July 23, 1984, the date of his mine accident. (Joint Exh. 1, p. 23). Thereafter, on February 7, 1986, plaintiff submitted an application for disability pension benefits from the 1974 Pension Plan to the Fund, together with a copy of his Social Security Award Certificate. (Joint Exh. 1, pp. 3-6).

7. Following plaintiff's submission of the application for a disability pension, the Fund submitted a request to the Social Security Administration for plaintiff's file because an award of disability insurance benefits by the Social Security Administration is a prerequisite for disability pension benefits, and a determination in connection with an applicant's eligibility for such benefits cannot be made by the Fund without the applicant's Social Security file.

8. On May 23, 1986, the Workmen's Compensation Appeal Board confirmed the Referee's second denial of plaintiff' s claim for Workmen's Compensation. (Joint Exh, 1, pp. 43-46). In its opinion, the Appeal Board stated in part:

* * *

> In denying the Claimant's petition, the Referee considered the submitted report dated January 4, 1985 of Claimant's medical witness, Dr. William J. Mitchell and concluded that this report failed to prove that the work-related incident aggravated Claimant's pre- existing tumor. The Referee may accept or reject any medical witness, testimony, in whole or in part. Kraemer v. W.C.A.B., 474 A.2d 1236 (1984). Dr. Mitchell does not conclusively find that the trauma suffered by Claimant aggravated the pre-existing tumor; rather, the doctor states that it is "quite possible that it was aggravated by the trauma that occurred to the ankle." The Referee did not err when she concluded that Claimant failed to prove by unequivocal evidence that his disability was the result of the incident at work on July 23, 1984.

* * *

(Joint Exh. 1, pp, 43-46).
Subsequently, plaintiff appealed the Workmen's Compensation Appeal Board decision to the Commonwealth Court of Pennsylvania, and the majority of a divided panel affirmed the Board's decision on October 11, 1990. Plaintiff then filed a petition for allocatur with thePennsylvania Supreme Court, which was granted. (Joint Exh. 1, pp, 50-51).

9. On August 13, 1986, the Fund received plaintiff's - file from the Social Security Administration. In response to the Fund's investigation of plaintiff's entitlement to disability pension benefits, plaintiff's former employer, United States

.Steel Mining Company, Inc., sent a letter to the Fund, informing the Fund that plaintiff did not report the alleged accident to mine officials on the day he claimed it happened; that he did not request medical attention; that he was on the midnight shift, which he completed and went home; that he called the mine the next day to inform his supervisor that he had injured himself the night before at work and would not be in for his shift; that a Referee denied his application for Workmen's Compensation Benefits; and that the denial was upheld by the Workmen's Compensation Appeal Board. The employer also indicated that it did not have any medical information because plaintiff had not submitted any to it. (Joint Exh. 1, p. 47).

10. On November 4, 1986, Carol Headley, a Field Service Representative for the Fund, sent plaintiff's application for a disability pension, together with his file, to Barbara McGeoch, the Manager of the Fund's Field Operations, for a disability narrative. The cover letter states in part: "Attached please find a disability pension application which does satisfy the three criteria (Form #64031) for establishing eligibility. This case is forwarded for preparation of the disability narrative." (Joint Exh. 1, p. 17).

11. On December 30, 1986, a Clinical Consultant from the Fund's Central office prepared the following notes in connection with plaintiff's application for disability pension benefits:

> Alleges mine injury July 23, 1984 - Did not report injury until July 24 when he called and said he would not be on midnite (sic) shift because of July 23 injury -He worked full shift July 23-
>
> Saw a Dr. on July 24, 184 - But no record in file to

validate why or his chief complaint when he went to see Dr.

SS App. For Disability Benefits does not indicate-how he initially injured ankle - only states "injury to ankle" SSA Application does indicate that he was self-employed "cutting grass" -

Since he did not report injury day it occurred, he did work full shift day of alleged injury, there is no mention of how he injured ankle in SSA Application, W.C. does not acknowledge that injury occurred, I believe that we need more evidence to establish that injury to foot & ankle occurred in the mines - only evidence to verify injury is by history noted in one medical report. Based on Mitchell's report I accept that there was an ankle injury and that it aggravated a pre-existing tumor - However, I am not convinced of how ankle was injured or where - need to secure

1) the records (not a report or summary) of his July 24th visit in order to determine the reason for the visit and what he told Dr. about injury.

2) a record (not report or summary) of his 8/24/84 visit to Dr. Wm. Mitchell -

Before final determination can be made -

(Joint Fxh, 1, pp. 12-13).

12. On January 30, 1987, plaintiff provided the Fund with the record of his visit to Dr. Mitchell on August 24, 1984. The record states:

8/24/84

Present condition: The patient reports he fell July 23, 1984 at work in Maple Creek and he reported it to the foreman who apparently said he was not going to report it and didn't.

Was seen by Dr. Eisley at Mon Valley. Had x-rays made, hot soaks, rest, crutches and was advised he had a bone cyst. He comes in today with the ankle still grossly swollen on both sides.

The x-rays show a possible displaced fracture just behind the inner condyle of the tibia and overtop of that is a bone cyst of the fibula. The ankle mortise is intact, however. I suggested we get some Jobst treatment to eliminate the swelling and then re-evaluate the ankle because he states motion is restricted. I told him to stay off it with no weight bearing at all.

Prognosis: Good

Return to Work: Disabled

(Joint Exh. 1, p. 22)

13. On March 31, 1987, Ms. Headley called Dr.

Eisley's office and requested plaintiff's medical records. Dr. Eisley's office declined to provide the medical records, however, because the office did not have a signed release by plaintiff. In addition, the office required a pre-payment of $25.00 for the medical records. (Joint Exh. 1, p. 16).

14. On June 24, 1987, Ms. Headley called plaintiff to explain the situation concerning his medical records. In particular, she explained that the Fund needed a copy of the office notes from his visit to Dr. Eisley on July 24, 1984. In response, plaintiff indicated that he would get the medical records and supply them to the Fund. (Joint Exh. 1, p. 16).

15. On July 8, 1987, the Fund received the medical records from plaintiff. The office notes from his visit to Dr. Eisley on July 24, 1984 state, in part, that plaintiff injured his right ankle at 6:00 a.m. on Monday, July 23 as he stepped off a motor and twisted his ankle. 0n July 9, 1987, Ms. Headley informed Betty Veach, the Director of the Fund's Morgantown Field Service Office, that plaintiff had submitted the records of his visit to Dr. Eisley on July 24, 1984. Plaintiff's file was then forwarded for review to Richard Robinson, the Assistant Director of the Fund's Morgantown Field Service Office. (Joint Exh. 1, p. 15).

16. Section 614.1.12 of the Fund's Pension Processing Manual (the Manual) provides that the following documentation is required for a disability pension: (1) Occurrence of a Mine Accident on a Specific Date Involving the Applicant; (2) Classified Signatory Employment; (3) Social Security Disability (SSDI) Award; and (4) Total Disability as the Result of a Mine Accident. With respect to the first category of required documentation - the occurrence of a mine accident - the Manual indicates that the following

sources of documentation are acceptable: (1) Accident Reports; (2) Employer Statements; and (3) Work Records and/or State Workers' Compensation Records. (Joint Exh. 3).

17. Mr. Robinson reviewed plaintiff's application for disability pension-benefits, together with his file, and concluded that plaintiff failed to satisfy the Manual's first requirement for a disability pension: namely, he failed to establish the occurrence of a mine accident. As a result, Mr. Robinson directed Ms. Headley to contact plaintiff to explain that his application would be denied, unless he provided proof of the accident within 30 days. (Joint Exh. 1, p. 14).[3] By letter dated September 30, 1987, Ms. Headley notified plaintiff that his application for a disability pension would be denied "unless [he] show[ed] proof of the occurrence of a mine injury on July 23, 1984."- (Joint Exh. 1, p. 57).

18. The Fund has prepared and published a series of .Questions and Answers (Q&A) regarding determinations of total disability. Q&A 252 provides in part:

> Subject; DISABILITY PENSION; Mine Accident
> Reference: (50P) II E; (74P) II C, D Trustees Decision

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[3] In this connection, on October 18, 1972, the Fund's Board of Trustees passed Resolution No. 90 which provides, inter alia, that the burden of proving eligibility for benefits from the Fund is on the applicant. (Defendant's Exh. D. p. 10). With respect to hearings on appeals from adverse eligibility decisions, the Fund's Procedures Manual also places the burden of proof on the applicant. (Defendant's Exhs. B, C).

Q. The.1950 and 1974 Benefit and Pension Plans provide benefits to certain persons who are tot4lly disabled as a result of a mine accident, For purposes of these provisions, what test must be met for a finding that a miner was "disabled as the result of a mine accident?"

A. The following three characteristics must be present: (1) Unexpectedness: The disability must have been unlooked for and unforeseen; (2) Definiteness: The disability must be traceable to a definite time, place and occasion which occurred within the course of the mine worker's employment. A progressive disease does not meet this test and therefore cannot be a disability that resulted in a mine accident; (3) Force or impact: The disability must have been caused by the exertion or impact of some external physical force or object against the body or by the exertion or impact of the body against some external physical object; i.e., not simply as a result of the mine worker's own physical condition.

Miners who become disabled under the circumstances described in the following exam.ples can be considered "disabled as the result of a mine accident" under the three tests stated above:

* * *

(b) a miner slips and falls;

* * *

(Defendant's Exh. A, Joint Exh. 2, p. 5).[4]

On November 2, 1987, Ms. Headley prepared a Disability Summary regarding plaintiff's application for disability pension benefits, concluding that, based on the lack of an accident report, plaintiff was not involved in a mine accident that met the criteria of Q&A 252. (Joint Exh. 1, p. 56).

19. On November 18, 1987, Ms. Veach sent the following letter to plaintiff:

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[4] With respect to the issue of whether a miner with a pre-existing condition is "totally disabled as the result of a mine accident," the Fund's Pension Processing Manual Provides in part:

* * *

> **232 Determining the Cause or Causes of the Claimed Disability**. When there are multiple components to a disability and the disability is not due to a single clear mine accident, the resulting disability may still be the result of a mine accident:
>
> a. Pre-Existing Condition. If a condition or injury resulting from a mine accident substantially aggravates or combines with a pre-existing condition or prior injury which did not result from a mine accident, and the miner thereby becomes totally disabled, the miner is considered "totally disabled as the result of a mine accident."

* * *

(Joint Exh. 3, p. 2).

November 18, 1987

Abraham E. Fotta
30 Pine Ridge Road
Lemont Furnace, PA 15456

SS#: 192-18-0115
Dear Mr. Fotta:

We regret to inform you that your application for a disability pension has been denied because you do not meet the eligibility requirements of the 1974 Pension Plan.

Your application was denied because:

You have not established that your disability was caused by, a mine accident. Please contact our office if you disagree with our decision, We will be glad to discuss the eligibility requirements for disability pensions. if you are not satisfied that our decision is correct, you can request a hearing. This request must be filed within 90 days of the date of this letter.

If you have any questions, please do not hesitate to contact our office.

Sincerely,
Betty Veach
Director Morgantown Field Service Office
0286-23

(Joint Exh. 1, p. 58).

Following receipt of Ms. Veach's letter, plaintiff did not

request a hearing on the denial of his application for a disability pension.

20. On June 1, 1993, the Pennsylvania Supreme Court issued a decision reversing the October 11, 1990 judgment of the Commonwealth Court of Pennsylvania, which had affirmed the decisions of the Workmen's Compensation Referee and Appeal Board, (Joint Exh. 1, pp, 48-55). Plaintiff sent a copy of the decision to the Fund on June 15, 1993.[5]

21. On August 12, 1993, based on the decision of the Pennsylvania Supreme Court, another Disability Summary was prepared by the Fund's Morgantown Field Service Office regarding plaintiff's application for a disability pension. (Joint Exh. 1, p, 61). The following day, August 13, 1993, a letter was sent to plaintiff to explain the federal income tax withholding laws, together with a Federal income Tax Withholding Election Form. The letter indicated that an executed copy of this form must be submitted to the Fund before the processing of plaintiff's application could be completed. (Joint Exh. 1, p. 18).

22. On August 25, 1993, M.R. Galusky, a Program Specialist at the Fund's Morgantown Field Service Office, sent a letter to plaintiff's former employer, United States Steel Mining Company, Inc., requesting information concerning plaintiff's work history, including plaintiff's receipt, if any, of Sickness

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[5] The last two pages of the copy of the Pennsylvania Supreme Court's decision that was submitted to the Fund by plaintiff were not part of the decision regarding plaintiff's case. The last two pages of the decision pertaining to plaintiff are missing from the Fund's copy of this document.

and Accident benefits. (Joint Exh. 1, p 76). In response, on August 17, 1993, United States Steel Mining Company, Inc. sent a letter to plaintiff, informing him that he had received Sickness and Accident benefits for the period November 5, 1983 through December 4, 1983, as a result of an injury sustained on November !4, 1983. (Joint Exh, 1, p. 11).

23. On September 29, 1993, Linda DeFuria, a Registered Nurse and Disability Pension Analyst for the Fund, prepared a report concerning plaintiff's application for a disability pension, recommending the plaintiff be awarded a 1974 Plan Pension Disability. The report states in part:

* * *

> ... based upon the aforementioned reasons, a full clinical summary has been waived since I am able to establish the existence of a causal link between the mining accident and the disabling diagnosis. The record indicates that although this tumor pre-existed the injury, it was asymptomatic and that the trauma from the injury caused this undiagnosed tumor to grow rapidly, causing eventual total disability. Therefore, I am able to respond favorably regarding this initial application for a Funds disability pension.

* * *

(Joint Exh. 1, pp. 59-60).

The next day, September 30, 1993, Linda W. Fritz, a Senior Manager in Eligibility Processing for the Fund, concurred with Ms. DeFuria's recommendation. (Joint Exh. 1, p. 60).

24. By letter dated November 1, 1993, Kyu W. Lee, the Assistant Director of the Fund's Eligibility Services, notified plaintiff that his application for a disability pension had been approved with. an effective date of September 1,

1985.[6] A check in the amount of $18,835.00 was enclosed with Mr. Lee's letter. (Joint Exh.: 1, pp. 62, 75).

25. Shortly thereafter, on November 9, 1993, plaintiff filed a Request for Hearing with the Fund.[7] In the request, :plaintiff indicated that he wanted the effective date of his disability pension changed to July 24, 1984, the date of his mine injury and that e wanted interest on the award. (Joint Exh. 1, p, 77). By letter dated January 7, 1994, Karen Caldwell, at Program Assistant at the Fund's Morgantown Field Service Office, notified plaintiff that a pre-bearing conference would be held before the actual hearing on his appeal, and that the pre-hearing conference was scheduled for January 20, 1994. (Joint Exh. 1, p. 78).

26. On January 25, 1994, Ms. Galusky prepared a Pre-Hearing Worksheet in connection with plaintiff's Request for Hearing, setting forth the reasons for the original denial, the issues in dispute, and the type and source of evidence required to support the appeal. (Joint Exh. 1, p. 91). A pre-hearing conference was held the next day, and Ms. Galusky prepared a summary of the conference, indicating that plaintiff had been advised that the Fund would review the

---

[6] Following the mine accident, plaintiff was paid Sickness and Accident benefits by United States Steel Mining Company, Inc. from July 24, 1984 to August 19, 1985. Based on plaintiff's receipt of these benefits, it appears that the Fund determined that the effective date of plaintiff's disability pension should be September.1, 198S. (Joint Exh. 1, p. 91).

[7] Although Plaintiff dated the Request for Hearing "November 9, 1994," it is apparent that the request was completed on November ,9, 1993. (Joint Exh. 1, p. 77).

Pennsylvania Supreme Court's decision regarding his claim that the effective date of his disability pension should be July 24, 1984; that there was a possibility that the Fund could 'back date" the effective date of his disability pension; and that no interest would be paid on the award. In response to Ms. Galusky's indication that he would not be paid interest on the award in any event, plaintiff apparently told Ms. Galusky that he would take the Fund to court if his request for interest was denied. (Joint Exh. 1, p. 90).

27. On March 21, 1994, Ms. Galusky prepared a memorandum regarding her contact with plaintiff, The memorandum states that, on March 21, 1994, plaintiff submitted an interlocutory order by the Workmen's Compensation Judge dated January 28, 1994, which (1) directed United States Steel Mining Company, Inc, to pay Workmen's Compensation benefits to plaintiff commencing July 24, 1984 and (2) awarded plaintiff statutory interest at the rate of 10% payable on all deferred Workmen's Compensation payments. The memorandum also states that, based on the Judge's interlocutory order, plaintiff's appeal to change the effective date of his disability pension to July 24, 1984 would be granted. Finally, the memorandum states that no interest could be paid to plaintiff, and that plaintiff intended to pursue his appeal of the interest issue upon receipt of the letter granting his appeal of the effective date of his disability pension. (Joint Exh. 1, p. 93).

28. By letter dated June 28, 1994, plaintiff was notified by Ms. Veach, the Director of the Fund's Morgantown Field Service Office, that, based on the interlocutory order of the Workmen's Compensation Judge, the effective date of his disability pension had been changed. Ms. Veach also states in the letter that the 1974 Pension Plan

did not contain any provision allowing payment of interest on any pension amount in dispute. (Joint Exh. 1, p. 94).

29. By letter dated July 29, 1994, plaintiff was notified by Mr. Lee that, based on the new effective date of his disability pension, the Fund owed plaintiff an additional payment of $1,965,00. (Joint Exh. 1, p. 63). Due to plaintiff's failure to succeed in his appeal of the interest issue with the Fund, he filed this civil action.

Conclusions of Law

30. On September 23, 1997, a memorandum opinion was filed in this case, which, inter alia, dismissed plaintiff's ERISA claim against defendants under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted.[8] On appeal, the United States Court of Appeals for the Third Circuit held, as a matter of first impression, that a beneficiary may bring an action for interest on delayed benefits payments under the section of ERISA allowing actions for "other appropriate equitable relief," irrespective of whether the beneficiary also seeks to recover unpaid benefits in the action, As a result, the Third Circuit reversed the court's decision to dismiss plaintiff's ERISA claim and remanded the case for further proceedings consistent with its opinion. See Fotta v. Trustees of the United Mine Workers of America, Health and Retirement Fund of 1974, 165 F.3d 209 (3d Cir.1998)(Fotta I).

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[8] The court also dismissed plaintiff's state law claims against defendants for lack of subject matter jurisdiction in the September 23, 1997 memorandum opinion. Thereafter, plaintiff abandoned his state law claims.

31. In support of the argument that he is entitled to interest on the lump sum representing monthly disability pension payments back to the date of his mine accident in 1984, plaintiff relies, in large part, on the following statement of the Third Circuit in Fotta I: "... We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed." Id. at 214. Defendants also rely on the Third Circuit's opinion in Fotta I in support of their position that plaintiff has failed to show entitlement to an award of interest. Specifically, defendants maintain that the word "delayed," as used by the Third Circuit in Fotta I, infers a wrongful denial of ERISA benefits, and that, because the evidence in this case does not support a finding that the Fund wrongfully denied disability pension benefits to plaintiff in 1986, he is not entitled to an award of interest.

32. In a memorandum opinion dated October 27, 2000, which was filed in connection with plaintiff's motion for class certification in this case, the court specifically stated that it read Fotta I "as recognizing a cause of action for interest on delayed benefits payments to the extent that the benefits payments were 'wrongfully withheld' or 'wrongfully delayed.'" (Mem. Op., p. 6, 10/27/00). The court then noted the parts of the Fotta I decision, as well as the parts of the Third Circuit's opinion in a later decision, Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124 (3d Cir.2000), that supported its reading of the case.[9]

---

[9] In Holmes, pension plan participants brought an against the plan administrator under ERISA, seeking, inter alia, interest on pension benefits they received after a decade and a half of delay. The delay was attributable to a mistake by the plan administrator in calculating the monthly benefits due to the

33. After further consideration of these Third Circuit decisions and for the reasons set forth in its October 27, 2000 memorandum opinion, the court again concludes that, to prevail on his claim for interest in this case, plaintiff must show that the Fund "wrongfully withheld" or "wrongfully delayed" the payment of his disability pension benefits. To meet this burden, the court agrees with defendants that plaintiff must show that the Fund's initial denial of his application for a disability pension in 1986 was arbitrary and capricious. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111-15 (1989); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 119 (3d Cir.1990). Based on the documentation that was before the Fund at the time of the denial, however, the court cannot conclude that plaintiff has met this burden, There simply is no evidence that the Fund's actions in any way contravened the eligibility provisions of the 1974

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plan participants in light of a 1977 amendment to the plan relating to offsets of pension benefits received by a participant from sources other than the plan itself. The plan participants successfully prosecuted their claim for interest on the wrongfully delayed pension benefits in the district court. On appeal, they challenged two equitable limitations the district court placed on the interest it awarded.

Pension Plan.

34. Unlike the situation presented to the district court in Holmes, supra, the "delay" in payment of disability pension benefits to plaintiff was not due to a mistake by the Fund, nor was it due to any other conduct on the part of the Fund that could be characterized as "wrongful." Rather, the "delay" was due to plaintiff's failure to provide to the Fund an accident report, an employer statement or Workmen's Compensation records to establish the occurrence of a mine accident as required by Section 614.12 of the Fund's Pension Processing Manual.[10] Significantly, after receiving the Pennsylvania Supreme Court's June 1, 1993 decision, which reversed the determination of the Workmen's Compensation Referee and Appeal Board that plaintiff had not suffered a work-related injury on July 23, 1984 in connection with his ankle condition, the Fund promptly processed plaintiff's application for disability pension benefits and made a lump sum payment to plaintiff for the benefits he would have received if he had established his eligibility for such benefits at the time of his original application in 1986. Under the circumstances, judgment will be entered in favor of defendants and against plaintiff.

An order follows.

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[10] As noted in footnote 3, the burden of proving eligibility for pension benefits from the Fund was on plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
Defendants	)	

ORDER

AND NOW, this 29th day of March, 2001, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. Judgment is entered in favor of defendants, Trustees of the United Mine Workers of American Health and Retirement Fund of 1974, Michael Holland, Donald Pierce and Joseph Stahl, and against Plaintiff, Abraham Fotta.

2. The Clerk shall mark this case closed.

William L. Standish
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
Defendants	)	

MEMORANDUM

I

In this civil action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA), plaintiff, Abraham Fotta, seeks interest from defendants, Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 (the Fund), Michael Holland, Donald Pierce, Elliot Segal and Joseph Stahl, on a back-payment of. disability pension benefits granted by the Fund to plaintiff.[1]

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[1] Plaintiff's amended complaint asserts two state law claims in addition to the ERISA claim remaining before the court, By memorandum and order dated September 23, 1997, the court dismissed plaintiff's ERISA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and dismissed

Presently before the court is plaintiff's motion for class certification. For reasons that follow, the court will deny plaintiff's motion.

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without prejudice his state law claims for lack of subject matter jurisdiction.
Plaintiff appealed the dismissal of his ERISA claim. Defendants also appealed, seeking dismissal of plaintiff's state law claims with prejudice.
In Fotta v. Tr. of United Mine Workers, 165 F.3d 209 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit reversed the court's dismissal of plaintiff's ERISA claim and declined to consider defendants' arguments regarding their appeal because plaintiff had indicated that he would not pursue his state law claims in the event that the Third Circuit reinstated his ERISA claim, As a result, only plaintiff's ERISA claim remains.

II

A court cannot certify a proposed class if the proposed class does not satisfy the four prerequisites of Rule 23(a) of 2 the Federal Rules of Civil Procedure.[2] However, satisfaction of the four prerequisites is a necessary but not sufficient condition to class certification: a proposed class must also "fit within one of three categories of class actions defined in Rule 23(b)."[3] In Re Prudential Ins. Co. of American Sales Litig.,

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[2] Rule 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or .more members of a class may sue or be sued as representative parties on behalf of all only .if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P, 23(a). The four prerequisites are commonly referred to as "numerosity, commonality, typicality and adequacy of representation." E.g., In re Prudential Ins. Co. of America Sales Litig., 148 F.3d 283, 308-09 (3d Cir. 1998).

[3] Rule 23(b) provides as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with

respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the, controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ. P. 23(b).

148 F.3d 283, 309 (3d Cir. 1998).

III

Plaintiff moves for certification of a class "consisting of persons and/or claimants and/or beneficiaries who have been denied interest on delayed payments from the [Fund.]" (Motion at 1). Plaintiff indicates that the class may be comprised of the following three sub-classes: (1) "[a]pproximately 450 persons who appealed the initial denial of benefits successfully following administrative and appellate delay[;]" (2) "[a]pproximately 9,000 persons :who are,receiving disability benefits following administrative delay[;]",, and, (3) "[a]pproximately 107,000 persons who are receiving various pension benefits following administrative delay." (motion at 2).

Defendants do not dispute that plaintiff's proposed class meets the numerosity and adequacy of representation requirements of Rule 23(a). Although defendants dispute plaintiff's contention that the proposed class satisfies the rule's remaining requirements, commonality and typicality, the court need only consider the requirement of commonality because a determination regarding that requirement is dispositive of plaintiff's motion.

"The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." In re Prudential Ins. Co. of America Sales Litig., 148 F.3d at 310 (citation omitted). Plaintiff insists that "the principal, controlling issues in this case are uniform, classwide questions" and asserts the existence of three such issues: (1) availability of interest; .(2) rate of interest; and (3) applicable period of time. (Br. at 8). (See Br. at 10).

Couched in different terms, plaintiff argues that the issues of liability and remedy are essentially "uniform, classwide questions." Plaintiff's argument is without merit.

In Fotta v. Tr. of United Mine Workers, the Third Circuit stated as follows:

> We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of BRISA, irrespective of whether the beneficiary also seeks to recover unpaid benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable, defenses such as laches . . . .
>
> * * *
>
> We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.

165 F.3d 209, 214 (3d Cir. 1998).

In its holding, the Third Circuit did not refer to "wrongfully withheld" or "wrongfully delayed" benefits payments. Nonetheless, the court reads Fotta as recognizing a cause of action for interest on delayed benefits payments to the extent that the benefits payments were "wrongfully withheld" or "wrongfully delayed."

Several parts of the Fotta decision support the court's reading. In explaining the rationale for the recognition of prejudgment interest is an ERISA suit to-recover benefits due, the Third Circuit stated that "[t]o allow the Fund to

retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the claimant] whole because he has been denied the use of money which was his." Fotta, 165 F.3d at 212 (citation omitted). The Third Circuit continued thus:

> The principles justifying prejudgment interest also justify an award of interest whore benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns [of] making the claimant whole and preventing unjust enrichment . . . are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.

Id. (emphasis added).

The Fotta decision also contains the following statements:

> Fotta's complaint, accepted as true for present purposes, seeks interest as a compensatory remedy - that is, to compensate him fully for the Trustees' several-year-long delay in discharging their contractual responsibility to Fotta. Interest for late payment has long been regarded as an implicit part of a contractual obligation to pay money. This principle was recognized by the Supreme Court more than a century ago: "Every one who contracts to pay money

> on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties."

Id. at 213 (citation omitted)(emphasis added).

Finally, the Third Circuit stated that " . . . the awarding of interest where benefits have been unjustifiably delayed not only ensures full compensation, but also serves to prevent unjust enrichment." Id. (emphasis added).

The concurring opinion of Circuit Judge Alito also supports the court's reading. Circuit Judge Alito st@ited as follows:

> I am in general agreement with the opinion of the court. Under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), an ERISA beneficiary may bring a civil action "to obtain other appropriate equitable relief . . . to redress" a violation of the plan. If the plaintiff in this case can establish that the trustees violated the plan by failing to pay his benefits on time, an award of interest would constitute "appropriate equitable relief."

Id. at 215.

In addition to the foregoing support, the court's reading is still further supported by a recent decision of the Third Circuit. In Holmes v. Pension Plan of Bethlehem steel Corp., the Third Circuit twice characterized Fotta as holding "that ERISA permits actions to recover interest on wrongly withheld benefits even where the benefits were paid

before litigation." 213 F.3d 124, 128: 130 (3d Cir. 2000)(emphasis added). The Third Circuit also explained its Fotta decision as follows.

> In Fotta, we held that a beneficiary may bring an action under ERISA against a pension .plan "to recover interest on benefits the plan .paid after some delay, but without the beneficiary having sued under ERISA" to recover the benefits themselves. In earlier decisions, we had already recognized that prejudgment interest was available where the beneficiary had brought suit under ERISA to recover unpaid benefits.
>
> Those earlier decisions were based on recognition of the fact that
>
> > "[t1o allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further the relief granted would fall short of making [the claimant] whole because he has been denied the use of the money which was his."
>
> Those principles applied, we held in Fotta, whether the beneficiary ultimately recovered the wrongfully withheld benefits through judicial action, or through non-judicial means.

Holmes, 213 F.3d at 131 (citations omitted)(emphasis added).

Thus, the nature of plaintiff's ERISA claim for interest is clear. Equally clear is that a determination of liability on that claim and selection of an appropriate remedy must proceed on a case-by-case basis.

In Holmes, two named plaintiffs sought recovery of

interest on benefits payments that had been wrongfully delayed. Id. at 129-30. The two named plaintiffs also sought to certify a proposed class described thus:

> All persons., including beneficiaries, who are or were entitled to pension benefits under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies whose benefits were delayed, reduced or denied by the Plan for more than 90 days and who have received or will receive a retroactive payment by the Plan of such withheld pension benefits.

Id. at 135. Although the named plaintiffs were successful on their ERISA claim for interest, the district court denied certification of the proposed class on the ground that the proposed class was overbroad and ill-defined. Id. at 128, 137.

In affirming the district court's denial of certification of the proposed class, the Third Circuit stated as follows:

> . . . Appellants appear to believe that the interest entitlement of every class member ,can be calculated using a single, objective, formula, and that the parties, not the court, would be responsible for performing the requisite calculations. Such a belief, ignores Fotta's clear holding that interest on delayed ERISA benefits is an equitable remedy dependent upon the individual. facts of each claim. Thus, there is no single, objective formula for calculating each class member's interest entitlement. Moreover, it is the province of the court, not the parties, to balance the equities in each claim.
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> * * *
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> As already noted, the issue of liability itself requires

> an individualized inquiry into the equities of each claim.

Id. at 137-38.

The court can conceive of no reason why the Holmes rationale is inapplicable in the present case. In light of the foregoing, the court concludes that plaintiff has failed to demonstrate that the proposed class satisfies the commonality requirement of Rule 23(a). Accordingly, the court will deny plaintiff's motion for class certification.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA, Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL, Defendants	)	

ORDER

AND NOW, this 27th day of October, 2000, in accordance with the foregoing memorandum, it is hereby ORDERED that the motion of plaintiff, Abraham Fotta, for class certification (document no. 37) be, and hereby is, denied.

William L. Standish
United States District Judge

Filed December 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3619

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Appellant/Cross-Appellee

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL H. HOLLAND; DONALD E. PIERCE; ELLIOTT A. SEGAL; JOSEPH STAHL, II,

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No. 97-3663

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL HOLLAND; DONALD PIERCE; ELLIOTT SEGAL; JOSEPH STAHL, II,

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST; MICHAEL HOLLAND; DONALD PIERCE; ELLIOTT SEGAL and JOSEPH STAHL,

Appellees/Cross-Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No.: 97-cv-00566)

Argued September 15, 1998

Before: SLOVITER, SCIRICA and ALITO, *Circuit Judges*

(Filed: December 18, 1998)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This appeal calls upon us to decide whether the beneficiary of an employee plan may bring an action under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA") against the plan to recover interest on benefits the plan paid after some delay, but without the beneficiary's having sued under ERISA for the benefits. Relying on both ERISA and state-law theories, Abraham Fotta brought such an action against the Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 ("the Trustees"). The district court dismissed the ERISA count for failure to state a claim upon which relief may be granted and dismissed the pendent state claims without prejudice. Fotta appeals the dismissal of the

ERISA count and the Trustees cross-appeal to have the state claims dismissed with prejudice.

I.

Fotta's complaint alleges the following: While employed as a miner, Fotta was covered by a United Mine Workers-administered pension plan that provided, among other things, disability insurance. Fotta suffered a work-related injury on July 24, 1984, rendering him totally and permanently disabled. A considerable time after the injury, and only after the Pennsylvania Supreme Court upheld the causal relationship between Fotta's work and his disability under the Pennsylvania Workmen's Compensation Act, *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1147 (Pa. 1993), the Trustees granted Fotta disability benefits, with an effective date of September 1, 1993. The Trustees, however, later revised this effective date and granted Fotta disability benefits effective August 1, 1984. Accordingly, Fotta received a lump-sum back payment of $21,600 reflecting disability benefits from August 1, 1984, to September 1, 1993. Fotta then demanded interest on this back payment, which the Trustees refused.

Fotta sued the Trustees in the district court for the Western District of Pennsylvania. The three-count complaint seeks recovery under ERISA and, alternatively, under state-law theories of breach of contract and unjust enrichment. The Trustees moved to dismiss, arguing that the first count failed to state a claim under ERISA and that the remaining state-law counts were preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). The district court dismissed the ERISA count for failure to state a claim and then dismissed the remaining state-law counts without prejudice under 28 U.S.C. § 1367, stating that there was no longer federal jurisdiction over the case. We exercise plenary review over the district court's grant of a motion to dismiss. *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 315 (3d Cir. 1997).

II.

This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his or her benefits due under an ERISA plan only after

considerable delay, but without resorting to litigation to recover that payment, has a cause of action under ERISA. None of the other circuits has yet addressed the issue either. The district courts that have addressed the question are divided: two have held such claims for interest non-cognizable under ERISA, *see Devito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997); *Scott v. Central States Pension Plan*, 727 F. Supp. 1095 (E.D. Mich. 1989), and one has ruled that ERISA does provide a cause of action for interest, *see Hizer v. General Motors Corp.*, 888 F. Supp. 1453 (S.D. Ind. 1995).

Fotta invokes two of ERISA's civil-enforcement provisions, sections 502(a)(1)(B) and 502(a)(3)(B), codified at 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3)(B) respectively. The first of these provisions, section 502(a)(1)(B), is the means by which an ERISA plan beneficiary is authorized to sue to recover benefits under the plan. This subsection states in relevant part: "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . . ." The second of these provisions, ERISA section 502(a)(3)(B), permits a plan beneficiary "to obtain other appropriate equitable relief (i) to redress [violations of ERISA or of the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan."

The Trustees emphasize, and Fotta acknowledges, that Congress has not explicitly provided a cause of action for interest on delayed benefits payments. The parties further agree that no provision in the plan itself specifically establishes Fotta's entitlement to interest. The Trustees contend that because neither the statute nor the plan expressly provides for the relief that Fotta seeks, Fotta's claim must fail.

A.

We disagree with the Trustees' contention that the lack of an express provision for interest in ERISA is necessarily fatal to Fotta's claim. In enacting ERISA, Congress intended for the judiciary to develop a body of federal law "to deal with issues involving rights and obligations under private

welfare and pension plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)). This is, of course, not a boundless grant of authority; the development of federal common law under ERISA is appropriate only when "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." *Bollman Hat Co. v. Root*, 112 F.3d 113, 118 (3d Cir. 1997) (quotation marks and citation omitted). Accordingly, we must first determine whether recognition of a cause of action for interest under one of ERISA's enforcement provisions is a proper exercise of the court's power to develop the law of remedies under ERISA.

It is of considerable moment that we have previously recognized that a beneficiary may seek prejudgment interest in a suit to recover benefits due, notwithstanding the lack of an express directive from Congress to that effect. In *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992), we acknowledged, albeit in passing, that prejudgment interest was available in actions to recover benefits under ERISA (although we ultimately found that the claimant's failure to timely request such interest deprived the court of jurisdiction to award interest). We reiterated and amplified this ruling in *Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992). What is even more significant, we did so while acknowledging that ERISA does specifically provide for prejudgment interest in another class of actions—lawsuits to recover delinquent employer contributions under 29 U.S.C. § 1132(g)(2)(B). *Id.* at 1009. "In recognizing the availability of a discretionary award of prejudgment interest in *Schake* and *Anthuis*, we embraced the Eighth Circuit's reasoning in *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986), and *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984). In the latter case, the court set forth the rationale for the recognition of prejudgment interest: "To allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the claimant] whole because he has been denied the use of money which was his." *Short*,

729 F.2d at 576. Adopting these precepts, we held in *Schake*, and reiterated in *Anthuis*, that "prejudgment interest typically is granted to make a plaintiff whole because the defendant may wrongfully benefit from use of plaintiff's money." *Schake*, 960 F.2d at 1192 n.4; *Anthuis*, 971 F.2d at 1009.

The Trustees do not take issue with the holdings in these cases. On the contrary, they approve the cases where the courts have awarded prejudgment interest when tied to an underlying judgment on the merits, notwithstanding the lack of explicit statutory authority for such interest. Instead, the Trustees seek to distinguish the award of prejudgment interest in the circumstance where benefits have been recovered from that where the beneficiary brings an independent action solely to recover the interest, arguing that the claim for benefits is expressly provided in section 502(a)(1)(B). This was essentially the position of the district courts in *Devito* and *Scott*.

We believe the distinction is unpersuasive. The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in *Schake* and *Anthuis*—*viz.*, making the claimant whole and preventing unjust enrichment—are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.

Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary. *Accord Hizer*, 888 F. Supp. at 1461.

B.

We are also unpersuaded by the Trustees' argument that Fotta's claim for interest is not cognizable because it is one

that seeks "extracontractual damages" within the contemplation of the Supreme Court's opinion in *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). Indeed, *Russell* was the principal basis for the district court's denial of interest in this case. To be sure, the *Russell* Court rejected a beneficiary's effort to invoke ERISA's fiduciary obligations as a means of recovering damages arising from delayed benefits. In so doing, however, the *Russell* Court held no more than that the civil-enforcement provision relating to breaches of fiduciary duty does not provide the claimant with a cause of action for consequential and punitive damages. The court expressly reserved the issue whether any of ERISA's other civil-enforcement provisions might authorize the kind of relief sought in *Russell*: "Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3) [permitting an action for "other appropriate equitable relief"], we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." 473 U.S. at 139 n.5.

Moreover, we do not find that an interest claim is "extracontractual" within the intendment of the *Russell* opinion. Unlike the plaintiff in *Russell*, Fotta is not seeking consequential or punitive damages. Fotta's complaint, accepted as true for present purposes, seeks interest as a compensatory remedy—that is, to compensate him fully for the Trustees' several-year-long delay in discharging their contractual responsibility to Fotta. Interest for late payment has long been regarded as an implicit part of a contractual obligation to pay money. This principle was recognized by the Supreme Court more than a century ago: "Every one who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties." *Spalding v. Mason*, 161 U.S. 375, 396 (1896) (internal quotation marks omitted). And more recently, the Court noted that "prejudgment interest traditionally has been considered part of the compensation due plaintiff." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989).

Consequently, we find that a cause of action for interest on delayed benefits payments is not foreclosed by either the

terms of ERISA or the terms of the plan. We further conclude that section 502(a)(3)(B) of ERISA—allowing a beneficiary to sue for "other appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan"—is the appropriate vehicle for such a cause of action. This conclusion is consistent with our holding in *Anthuis* that the awarding of prejudgment interest under ERISA is within the district court's discretion, "given in response to considerations of fairness and denied when its exaction would be inequitable." 971 F.2d at 1009 (alteration and quotation marks omitted). Indeed, prejudgment interest is generally recognized as an equitable remedy in other legal contexts. *See Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 574 (3d Cir. 1998) (Prejudgment interest is an equitable remedy under New Jersey law.); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 616 (3d Cir. 1991) ("When deciding whether to award prejudgment interest to a party, a court must consider 'whether countervailing equitable considerations militate against such a surcharge.' ").

Hence, Fotta's claim for interest is appropriately raised under Section 502(a)(3)(B), the civil-enforcement provision relating to equitable relief.[1] In this regard, the Trustees' argument that an interest award cannot be equitable because it is an award of money (as opposed to an injunction) misses the mark. As noted above, the awarding of interest where benefits have been unjustifiably delayed not only ensures full compensation, but also serves to prevent unjust enrichment. Restitution—the traditional remedy for unjust enrichment—is widely, if not universally, regarded as a tool of equity. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (Money damages are considered equitable when "they are restitutionary."); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (differentiating, under the Emergency Price Control Act of 1942, between statutory damages at law and restitutionary relief falling within the statutory grant of equity jurisdiction).

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1. Although we do not reject section 502(a)(1)(B) as providing a possible statutory bases for such a claim, we need not reach the issue in light of our decision.

In reaching this conclusion, we are mindful that the Supreme Court has shown an "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (quoting *Russell*, 473 U.S. at 146-147). But in recognizing that an action for interest may be maintained as an action for "other appropriate equitable relief" under ERISA, we do not run afoul of this caution. To be sure, section 502(a)(3)(B) "does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or ... enforc[ing] any provisions' of ERISA or an ERISA plan." *Mertens*, 508 U.S. at 253 (brackets in original). As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation. Therefore, an award of interest is an equitable remedy enforcing an ERISA plan provision, albeit an implied one, within the meaning of section 502(a)(3)(B).

In sum, by permitting this action to go forward, we are not "engraft[ing] a remedy on a statute . . . that Congress did not intend to provide." *Russell*, 473 U.S. at 145 (internal quotation marks omitted). Rather, we effectuate ERISA's objectives by recognizing, under principles of equity, that beneficiaries should be fully compensated and that any unjust enrichment of plans at beneficiaries' expense should be avoided.

We reject the Trustees' argument that we are without authority to recognize Fotta's claim. To the contrary, ERISA requires that we develop the law of ERISA so as to define the proper remedial scope of the statute. *See Russell*, 473 U.S. 134, 157 (Brennan, J., concurring) ("ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it."); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206, 208 (3d Cir. 1998) ("In a situation where the statute does not provide explicit instructions, it is well settled that

Congress intended that the federal courts would fill in the gaps by developing, in light of reason, experience, and common sense, a federal common law of rights and obligations imposed by the statute.").

We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of ERISA, irrespective of whether the beneficiary also seeks to recover unpaid benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable defenses such as laches, an issue the district court did not consider as it dismissed the complaint on motion. As this case will be remanded for the district court to exercise its discretion, we note that this court has held in other contexts that there is a presumption in favor of awarding interest. *See Brock v. Richardson*, 812 F.2d 121, 127 (3d Cir. 1997) (holding that award of pre-judgment and post-judgment interest is presumptively granted in back-pay cases under the FLSA). In *Stroh Container Co.*, the Eighth Circuit applied that presumption in an ERISA case, stating that interest "should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." 783 F.2d at 750. That statement was quoted approvingly by this court in *Anthuis*. 971 F.2d at 1010. We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.

III.

In their cross-appeal, the Trustees urge that the district court erred in dismissing Fotta's state-law claims without prejudice for lack of subject matter jurisdiction. The Trustees contend that the court continued to have federal question jurisdiction over those claims by virtue of the "complete preemption" doctrine. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 354 (3d Cir. 1995) (explaining complete preemption). Furthermore, the Trustees urge that the state-law counts should be dismissed with prejudice because they are preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a). The Trustees' arguments may have merit. But because Fotta conceded at

oral argument that he will not pursue his state-law claims in the event that his first count is found cognizable under ERISA, we need not decide these issues.

IV.

For the foregoing reasons, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring:

I am in general agreement with the opinion of the court. Under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), an ERISA beneficiary may bring a civil action "to obtain other appropriate equitable relief . . . to redress" a violation of the plan. If the plaintiff in this case can establish that the trustees violated the plan by failing to pay his benefits on time, an award of interest would constitute "appropriate equitable relief." Such an award is recognized as appropriate equitable relief in comparable circumstances under the law of trusts. See Restatement (2d) of Trusts § 207 at 470 (1959); 3 Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* § 207.1 at 262-63 (4th ed. 1987); *Nedd v. United Mine Workers of America*, 556 F.2d 190, 207 (3d Cir. 1977); *Toombs v. Daniels*, 361 N.W.2d 801, 810 (Sup.Ct.Minn. 1985). Thus, this is not a case like *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134 (1985), in which we are asked to supplement the remedies specified in the statute.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit